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Jenni Millbank PhD by Publication Supporting Statement

The works:

1. 'The Role of Functional Family in Same-Sex Family Recognition Trends' (2008) 20 *Child and Family Law Quarterly* 155-182.
2. 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' (2008) 22 *International Journal of Law, Policy and the Family* 149-177.
3. 'Unlikely Fissures and Uneasy Resonances: Lesbian Co-mothers, Surrogate Parenthood and Fathers' Rights' (2008) 16 *Feminist Legal Studies* 141-167.
4. 'From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of 'New' Surrogacy in Australia' (2012) 21 *Griffith Law Review* 101-136.
5. 'Rethinking "Commercial" Surrogacy' (2014) *Journal of Bioethical Inquiry* doi 10.1007/s11673-014-9557-9, advance access.
6. 'Embryo Donation for Reproductive Use in Australia' JM 40% contribution (Eloise Chandler Isabel Karpin and Anita Stuhmcke 20% each) (2013) 20 *Journal of Law and Medicine* 789-810.
7. 'Numerical Limits in Donor Conception Regimes: Genetic Links and "Extended Family" in the Era of Identity Disclosure' (2014) 22 *Medical Law Review* 325-356.
8. 'Identity Disclosure and Information Sharing in Donor Conception Regimes: The Unfulfilled Potential of Voluntary Registers' (2014) 28 *International Journal of Law, Policy and Family* 223-256.

Introduction, Aims & Methodology

At the broadest level my work explores the multiple and intersecting legal regimes that govern families and reproduction from a feminist socio-legal perspective. My publications appear in the highest quality scholarly journals, the majority of them international journals. This research has made a distinctive and internationally recognised contribution to the development of critical scholarship and law reform, broadening legal understandings of family and developing new approaches to relationship recognition in law.

My research examining legal regimes is informed by a broad range of sources of knowledge in addition to classic legal primary and secondary texts. Although I often draw upon reported case law to tease out how contested legal issues appear in formal representations this is rarely a purely doctrinal analysis, but rather comprises a contextual examination of how such issues came to be under contest and an exploration of the values, possibilities and norms at play. There are a number of different threads in my methodology apparent through the included works; these are: international comparative analysis; doctrinal analysis; interdisciplinary research in particular utilising sociological data; and my own empirical research, all taking place within a policy and reform framework that attends to the lived experience of law in order to inform legal developments.

My commitment to incorporating the 'lived lives' and unmet legal needs of affected populations was influenced by foundational Australian feminist legal scholars such as Reg Graycar and Jenny Morgan, who argued for the disregard of legal categories in favour of centring women's experiences, which cut across multiple legal arenas and doctrines.¹ Thus my body of work is not 'family law' in the traditional sense as I have never focused upon the jurisdiction of family courts dealing with matrimonial causes, property and child related disputes on separation. Nor is it 'health law' as my work on reproduction is linked instead to issues of kinship and family formation and thus places what would be regarded by law as distinct moments in medical decision-making or consent within this broader frame across the life cycle of reproductive choices and experiences. Yet as part of this work I have necessarily developed considerable doctrinal knowledge, with specific expertise on the complex issue of legal parentage in the field of assisted reproduction and surrogacy, child-related disputes in family law, and the regulation of assisted reproduction.

My commitment to 'lived lives' has meant that much of my legal analysis is undertaken through an inter-disciplinary lens, influenced by the approach of legally focused but sociologically informed feminist scholars such as Susan Boyd, Sally Sheldon and Carol Smart.² In particular I

¹ *The Hidden Gender of Law* (1990).

² Susan Boyd, 'Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility' (2007) 25 *Windsor Yearbook of Access to Justice* 55; Sally Sheldon, 'Reproductive Technologies and the Legal Determination of

focus upon social context and draw upon available sociological and psychological research into assisted reproduction, genetics and non-traditional families to unpack the values both implicit and explicit in law's responses to litigated controversies involving such families across a variety of arenas. In common with these scholars I address these controversies not just from a doctrinal perspective (ie what question was asked, and answered, in law, and whether/how that answer is in conformity with previous law or comparative law) but from a contextual and socially grounded perspective. Instead my work asks: what issues are being raised about understandings of motherhood, fatherhood and kinship? what issues are ignored or elided? what questions *ought* to have been asked but were not? Thus I engage in a consideration of range of other possibilities and meanings surrounding or undergirding the controversy. As I note later one of the questions I return to in this method is the implication of law in creating the conditions which produce the dispute in question, that is, how the exclusions or discriminatory impacts of law act to provoke or generate such controversies, ie through exclusions or limiting the range of choices available to participants.

While never having worked from a libertarian premise my later work develops a feminist perspective which values autonomy and 'resonant choice' for women in family formation and reproductive work practices. This approach has been strongly influenced by the work of Amrita Pande, Angela Campbell and Therese Murphy on 'textured' or 'resonant' choice.³ I argue that a feminist approach to choice entails a detailed and grounded understanding which attends to women's experiences and respects their agency, while acknowledging that a wide range of structural factors can and do constrain it. I propose that law must retreat from paternalistic, universalised and intrusive 'welfare' models in assisted reproductive technology (ART) regulation to make space for informed choice and autonomy which goes beyond 'consent' to a particular outcome and involves an active and on-going process of selection or 'resonant choice'. Within this frame I see a role for the State in enhancing opportunities for the exercise of such textured choice through maintaining minimum clinical and ethical standards of care and preventing demonstrably unsafe practices.

I have often undertaken comparative analysis drawing from the jurisprudence and scholarship of closely related jurisdictions, in particular Australia, the UK and Canada, in order to address common thematic issues and to draw them together towards reform proposals and solutions. I believe a comparative methodology to be particularly fruitful in this field. The UK, Australia, Canada and New Zealand have looked to each other regularly in developing legislative responses to assisted reproductive technologies over the past 30 years. These countries have

Fatherhood' (2005) 11 *Feminist Legal Studies* 349; 'Evans v Amicus Healthcare, Hadley v Midland Fertility Services: Revealing Cracks in the 'Twin Pillars'?' (2004) 16 *Child and Family Quarterly* 437; 'Only Skin Deep: The Harm of Being Born a Different Colour to One's Parents' (2011) 19 *Medical Law Review* 657.

³ See eg Amrita Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (2010) 35(4) *Signs* 969-992; Angela Campbell, *Sister Wives, Surrogates and Sex Workers* (2013); Therese Murphy, 'The Texture of Choice' in Therese Murphy (ed), *New Technologies and Human Rights* (2009) at 214.

all faced similar social movements at proximate historical moments (for example gender neutral 'equality' claims by lesbian and gay couples and parents for inclusion into existing legal avenues of family recognition, the rise of father's rights movements and discourse, an increasing emphasis on genetic 'truth'), but have addressed them within differing overarching legal frameworks. Thus for example litigation and advocacy in Canada has been strongly framed by the Canadian Charter of Rights and Freedoms, while, despite the influence of the UK Human Rights Act, in the UK and Australia family based reforms have been far more legislatively focused. Canada and Australia share the challenges of being a federation with multiple jurisdictions pulling in different directions, and also the benefit of internal comparisons and lessons learned as states/provinces build on or leapfrog over one another in their reform processes.

This comparative methodology has allowed me to build on, and enter into, a scholarly conversation about the meaning and impact of these developments, in particular addressing the tension of reform movements seeking apparently gender neutral 'equality' or legal 'inclusion' for non-normative, non-genetic families, at the same time as family law systems appear to be on a trans-national trajectory centring the 'eternal biological family' as a unit of state concern and intervention. My work has always been gendered in that I centre women's experiences and have therefore sought to distinguish the needs of lesbians in the face of 'neutral' but arguably male-centric legal claims for gay and lesbian family based rights by equality seekers. In this endeavour I have been strongly influenced and built upon the work of Canadian scholars such as Didi Herman, Shelley Gavigan and Susan Boyd and Claire Young who have consistently examined women's position in relation to both productive and reproductive labour to centre lesbians and deconstruct 'gay and lesbian' equality claims accordingly.⁴

More broadly my work engages with how gay and lesbian equality claims and those of other non-genetic families interact with prevailing ideas of fatherhood and genetics at work in law. Although the term was first coined by Selma Sevenhuijsen⁵, feminist socio-legal scholars in the UK such as Carol Smart, Bren Neale and Alison Diduck⁶, in Australia such as Reg Graycar,⁷ and in the USA Janet Dolgin,⁸ have argued that the rise of the 'eternal biological family' encapsulates

⁴ See eg Didi Herman, 'Are We Family?: Lesbian Rights and Women's Liberation' (1990) 28 *Osgoode Hall Law Journal* 789; *Rights of Passage* (1994); Gavigan, "Equal Families, Equal Parents, Equal Spouses, Equal Marriage: The Case of the Missing Patriarch" (2006) 33 *Supreme Court Law Review* 2d series 317; "A Parent(ly) Knot: Can Heather Have Two Mommies?" in Didi Herman and Carl Stychin (eds), *Legal Inversions: Lesbians, Gay Men and the Politics of the Law* (1995); Boyd and Young, 'Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada' (2006) 14 *Feminist Legal Studies* 213.

⁵ 'Fatherhood and the Political Theory of Rights: Theoretical Perspectives of Feminism' (1986) 14 *International Journal of the Sociology of Law* 329.

⁶ Smart and Neale, *Family Fragments* (1999); Alison Diduck, *Law's Families* (2004).

⁷ Reg Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millenium?' (2000) 24 *Melbourne University Law Review* 737.

⁸ Janet Dolgin, 'Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of the Family' (2000) 32 *Connecticut Law Review* 523.

developments through the 1990s in which ideas about the significance of genetic parenthood, in particular genetic fatherhood, fused with equality discourse, have come to dominate the family law landscape. I have been influenced by a number of UK scholars such as Smart, Therese Murphy and Ilke Turkmendag's work on attending to the elision of parents, and most particularly women, from child-centred discourses in reproduction and family law in recent years.⁹

In later work, Smart has examined paternity disclosure and welfare or 'best interests' approaches in law to the 'truth' of genetic heritage¹⁰ in ways highly relevant to my work in assisted reproduction and identity disclosure regimes. In the last two pieces included here I have developed my own work on how a *right to knowledge* about genetic progenitors in law has been uncritically translated into a *need to know* in policy and practice without attending to the diverse and contingent range of personal meanings that such information has to those affected by it.

My work is also strongly interdisciplinary. For example the last three papers presented here build upon an existing body of international and Australian sociological research regarding evolving kinship practices arising from ART, much of which has been developed through anthropology.¹¹ In examining the perspective of parents forming families through ART concerning legal and ethical rules governing their decisions about the use of frozen embryos, utilisation of donated gametes, and access to disclosure regimes, I employ and develop 'relational theory' most prominently articulated by Canadian feminist scholars such as Jocelyn Downie¹² and Jennifer Nedlesky¹³ to develop an understanding of access to information as informed by needs rather than rights, and as part of a family system of information sharing about genetic links that may, or may not, understand such links as 'relatives'.

I have always been an applied legal scholar in the sense that my research and writing on family and reproduction issues has been directed to reforms resolving identified problems and addressing unmet legal needs of vulnerable populations. Thus, while my work is theoretically informed it is applied to a reform agenda and tested against practical outcomes. The reform

⁹ Turkmendag, Dingwall and Murphy, 'The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-Be Parents' (2008) 22 *International Journal of Law, Policy and the Family* 283; Turkmendag, 'The Donor Conceived Persons Right to Personal Identity' (2012) 39 *Journal of Law and Society* 58.

¹⁰ 'Law and the Regulation of Family Secrets' (2010) 24 *International Journal of Law, Policy and the Family* 397.

¹¹ See eg Marilyn Strathern, *Kinship, Law & the Unexpected* (2005); C Thompson, *Making Parents* (2005); Sarah Franklin et al, *Technologies of Procreation*, 2nd ed (1999); Maggie Kirkman, 'Genetic Connection and Relationships in Narratives of Donor-Assisted Conception' (2004) 2 *Australian Journal of Emerging Technologies & Society* 1; Damien Riggs & B Scholz, 'The Value and Meaning Attached to Genetic Relatedness Among Australian Sperm Donors' (2011) 30 *New Genetics & Society* 41.

¹² Jocelyn Downie & Jennifer Llewellyn (eds), *Being Relational: Reflections on Relational Theory and Health Law*, (2011).

¹³ *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2012). Arguably this approach is also strongly present in an applied form in the recent report of Nuffield Council on Bioethics, *Donor Conception: Ethical Aspects of Information Sharing* (2013).

models I have developed through the course of this work include the formulation of automatic parentage recognition from birth for lesbian led families in assisted conception; the development of parentage transfer and citizenship rules for surrogacy families; revised laws, guidelines and practices for embryo donation and storage; and a hybrid altruistic/commercial model for compensated surrogacy with the assistance of paid intermediaries. The impact of this work in the Australian legislative context is significant.¹⁴

My 'presumed parent' model to accord legal recognition to children in families formed through assisted reproduction has been one of my most significant achievements in terms of implementing reform. This model was developed initially through my community law reform work¹⁵ and later deepened and articulated in more detail through comparative law scholarship on the notion of functional family. I developed an argument for extending existing parentage rules in assisted conception to provide a broadly applicable presumption based approach to parenthood from birth for the second parent in lesbian-led families that did not require a formal application or court based intervention. At the time this was a highly novel approach as legal recognition of lesbian parents in Canada and the US had largely been undertaken through formalised second parent adoption processes and in Australia and the UK through the use of court orders for more limited forms of parental responsibility. I argued that such court processes were an unnecessary barrier to parental status for in-tact functioning lesbian families and that from-birth consent based presumptions were more appropriate as well as more utilitarian. My 'presumed parent' model and its rationale was expressly endorsed by the NSW Law Reform Commission and acknowledged in NSW legislative debates;¹⁶ and has now been introduced into law in every Australian state and federal jurisdiction, the last of which was South Australia in 2011. At a federal level I was significantly involved in the raft of Australian legislative reforms concerning same-sex and surrogacy families which passed in late 2008. My intervention led to the abandonment of the government's original 'catch all' parent category and incorporation in federal law of my two key proposals concerning children born through assisted reproduction and surrogacy through the new s60HB and s60H(1) of the *Family Law Act 1975* (Cth). My written submissions and oral testimony to the Senate Inquiries, which directly drew from my research in **'The Role of Functional Family'** and **'The Limits of Functional Family'**

¹⁴ Recent law reform reports and inquiries which rely upon the research submitted here include: Family Law Council, *Parentage Reference* (2013); NSW Ministry of Health, *Review of the Assisted Reproductive Technology Act 2007* (NSW) (2013); Tasmanian Parliament, *Surrogacy Bill Inquiry* (2012); NSW Parliament, *Inclusion of Donor Details on the Register of Births* (2012) and *Inquiry into Donor Information* (2013); Queensland Parliament, *Investigation into Altruistic Surrogacy* (2008); Senate Committee, *Inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* (2008) (and parliamentary briefing paper); NSW Parliament, *Legislation on Altruistic Surrogacy* (2009).

¹⁵ See Jenni Millbank for the GLRL, *And then the Brides Changed Nappies: Lesbian Mothers, Gay Fathers and the Legal Recognition of Our Relationships with the Children We Raise*, A Community Law Reform Document, Final Report May 2003 and 'The Recognition of Lesbian and Gay Families in Australian Law: Part 2 Children' (2006) 34 *Federal Law Review* 205.

¹⁶ See *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW), NSW Legislative Council *Parliamentary Debates*, 3 June 2008; NSW Law Reform Commission, *Relationships and the Law*, 2006.

were relied upon in the Bills Digest, Senate Committee Reports and federal parliamentary debates.¹⁷

More recently I have contributed to policy development and reform of Victorian and NSW laws concerning the storage, donation and disposal of human embryos, through the '**Embryo Donation**' paper submitted here, as well as other outputs from the same research project. These works argue that the law fundamentally fails to take account of the diversity of ways in which stored IVF embryos have meaning for the women and men who created them. Thus mandatory time limits on storage, as well as restrictions on modes of disposal, are unnecessarily intrusive without any real benefit to IVF patients or broader policy goals. This research, in addition to law reform submissions on the same topic drawing upon the published work,¹⁸ and consultations with regulators, contributed to 2013 amendments to the *Assisted Reproductive Treatment Act 2008* (Vic) and 2014 amendments to the *Assisted Reproductive Technology Regulations 2009* (NSW).¹⁹ The reforms allow for longer and more flexible storage periods in both jurisdictions, and for the abolition of the distinction between donated and non-donated gametes in storage rules in NSW.

As noted above throughout my work I have drawn upon the social sciences both in terms of theoretical perspectives (in particular anthropological work on assisted reproduction and kinship studies) and methods to make use of empirical research into people's experience of law and family. Since the late 2000s this has included designing and conducting my own empirical research, in collaboration with colleagues Isabel Karpin and Anita Stuhmcke, into the views and experiences of people undertaking IVF, which I draw upon in the latter phase of scholarship presented here. To build a picture of the impact of law and policy on the actual choices and opportunities of ART users from the ground up, we utilised both qualitative and quantitative methods, conducting a series of interviews and surveys across Australian states and territories. The data draws on the experiences of past and present ART patients at over 20 different clinical sites, spanning more than two decades, covering all jurisdictions in Australia except the Northern Territory. Our sole inclusion criterion was that an individual or couple had engaged in

¹⁷ Senate Standing Committee on Legal and Constitutional Affairs, [Same-Sex Relationships \(Equal Treatment in Commonwealth Laws – General Law Reform\) Bill 2008, Report](#) (October 2008); Senate Standing Committee on Legal and Constitutional Affairs, [Family Law Amendment \(De Facto Financial Matters and Other Measures\) Bill 2008, Report](#) (August 2008); Parliamentary Debates, *Senate Hansard* Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, 14 October 2008; [Bills Digest](#) no. 9 2008-09 - Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008. See also Human Rights Commission, *Same-Sex: Same Entitlements*, Report 2007 and Jenni Millbank, *Areas of Federal Law that Exclude Same Sex Couples and Families*, Human Rights and Equal Opportunity Commission, Research Report 2006.

¹⁸ Millbank, Stuhmcke, Karpin, Submission to NSW Ministry of Health, *Review of the Assisted Reproductive Technology Act 2007* (NSW) (2013). We have also made submissions to a review of the federal ethical guidance: Millbank, Stuhmcke, Karpin, Submission to NHMRC Review, *Ethical Guidelines on Assisted Reproduction* (2014).

¹⁹ Kirsty Needham, 'NSW Health Dumps 10-year Limit on Frozen Embryos' 11 January 2015, [Sydney Morning Herald](#).

IVF treatment and stored embryos (whether at the time of this study or previously).²⁰ This empirical work involved seeking the views of those who were most intimately concerned with the subject matter of our inquiry; thus we did not seek the views of the general public or those contemplating treatment, but only those who had undertaken IVF and had embryos in storage as a result.

In all there were 349 eligible surveys and 51 semi-structured interviews with a total of 54 interviewees. As legal researchers undertaking this work we examined both the awareness of legal rules in decision-making and their impact in framing available choices. For example the ‘choice’ to donate or destroy embryos in a jurisdiction with a mandatory storage time limit is different to a voluntarily elected outcome. Quantitative data collected through the surveys was statistically analysed with the aid of SPSS. Qualitative data both in the surveys and interviews were subject to thematic discourse analysis.²¹ Close attention was paid to repeated discursive and narrative frames within the text, particularly in relation to how participants described their decision-making processes, and mismatches between participant understandings of their rights and options and the existing legal frameworks which they were subject to. Identified themes and motifs were then subject to comparative analysis, to ensure uniformity of interpretation. This engagement in directly conducting empirical work added a richer layer to my long-standing approach of incorporating data on the lived experience of law to an analysis of a multitude of legal rules governing IVF and subsequent information disclosure regimes.

The works

The collection of papers that I present here all grapple with the role of law in regulating access to family formation avenues for ‘reproductive outsiders’, and provides for various forms of recognition of families formed through such means, in particular for the parent-child relationship in non-genetic families.

Scholarship and activism concerning reproduction and parenting over the late 20th and early 21st centuries has evinced a bifurcated trend. Lesbian and gay family related issues and those of heterosexual parents have usually been addressed separately, by different people writing to, and speaking with, different audiences. Scholars on reproductive rights are more likely to mention cases concerning gay or lesbian parties in passing as evidence of a wider point (such as

²⁰ See Jenni Millbank, Anita Stuhmcke, Isabel Karpin and Eloise Chandler [Enhancing Reproductive Opportunity Report](#) 2013, Appendix I for detailed demographic data, including a comparison of survey and interview respondents. See Appendix II for the survey instrument.

²¹ In the sense proposed by Norman Fairclough – as a mode of action or social practice, as well as a mode of representation: Norman Fairclough, *Discourse and Social Change* (1992). Each member of the research team undertook repeated readings of interview transcripts and survey open responses both throughout the data collection period and afterwards. Following data familiarisation, each researcher coded transcripts for emergent themes.

the role of intention in determining parentage) rather than to centre their concerns and experiences within the analysis, or explore to them in any detail. Meanwhile, gay and lesbian family-related scholarship traditionally had a far greater focus on family *recognition* issues specific to gay men and lesbians as couples and, more latterly, parents, rather than on issues of reproductive rights related to family *formation*. Perhaps because many gay and lesbian families conceive in collaboration with each other in informal circumstances, access to family formation avenues has not been felt to be as pressing an issue as the legal recognition of families already in existence. Yet, there is a sizable portion of gay and lesbian intending parents who are either unable or unwilling to reproduce in concert with each other and so who *do* need state regulated avenues such as fertility services and surrogacy. Both of these avenues have historically been, and often continue to be, highly discriminatory against same sex couples. While commentators have pointed out the lack of reasoned basis for exclusions, and identified avenues for challenging exclusions, scholarly discussion has tended not to extend beyond quite formalistic in-or-out, equal-not-equal parameters. Moreover, when challenges have been brought, or campaigns waged, for change by gay and lesbian parenting groups or individuals, there has been little sense of common cause with heterosexual individuals and couples who are also prospective parents and who seek to use these same avenues of family formation. In short, gay and lesbian attention has been focused on the exclusion of gay men and lesbians by virtue of their sexuality, and has too frequently assumed that heterosexual people are *included* by virtue of their heterosexuality, overlooking the fact that heterosexual prospective parents are variably situated and may also suffer harmful and discriminatory forms of exclusion from assisted reproduction avenues for a wide range of reasons. My work has sought to traverse this gulf, by working simultaneously on both family formation and family recognition issues, and through considering ‘reproductive outsiders’ and centring the non-genetic family as a reference point, cutting across gay/straight and single/couple family typologies.

In earlier works I argued that legal categories must reflect the lived experience of family. As such, formal ‘equality’ claims by non-normative families were meaningless if they addressed comparators in a reductive or misleading sameness/difference binary; rather they must be grounded in a claim to *recognition*. The first three papers presented here, all published in 2008, were originally conceptualised as one article that grew into three distinct branches. These three articles explore the issue of legal recognition of non-genetic parents, particularly co-mothers in lesbian-led families, utilising ‘functionality’ and ‘intentionality’ as frames through which to understand non-genetic parents’ claims to parental status in law. Each paper builds upon the last as a related series in a discussion of the potentiality and perils of each frame of recognition once translated into legal rules and applied in contested situations such as litigation. A key thread to all of my work has been to produce grounded understandings and applications of legal theories and policies, and these three pieces do so through examination of litigated cases across comparative jurisdictions.

In the first of the papers, **'The Role of Functional Family'** I trace the development and translation of the notion of 'functional family' drawn from sociological thought across to jurisprudence and law reform models. This piece argues in favour of 'functional family' as being able to adapt to family diversity, evolve over time and tailor legal definitions to suit particular contexts or meet the particular legislative purpose. The sweep of the piece is large, addressing Canada, Australia, the UK and USA from the late 1980s through to the date of publication in 2008. In doing so, the article connects same-sex relationship recognition trends and claims to non-normative non-marital relationships more broadly, and to critiques and commentary of the developing frameworks of regulation of 'informal' and non-marital relationships. The descriptive content of case law and legislative developments is used to unearth and connect national and trans-national trends in which the 'lived reality' of family transformed not just particular legal categories but law's understandings of family relationships and its own role in regulating them.

In **'The Limits of Functional Family'** I temper the optimistic assessment of functional family claims to recognition with a deeply critical examination of how a functional family model has faltered in the context of both intra-lesbian disputes and lesbian-donor disputes concerning children. As with 'The Role of Functional Family' the article is grounded in a detailed comparative analysis of case law, drawn from the UK, Australia, Canada, the US and also New Zealand over a 20 year period. In particular this piece wrestles with the complex inter-relationship between legal approaches to functionality in the face of resistance by genetic parents and questions how gendered notions of *being* a parent and *doing* parenting play out in this context. I conclude that while functional family *should* work to resolve intra-lesbian and donor versus mother disputes, the case law demonstrates that it has not done so. A detailed analysis of the case law revealed that misapplication or misunderstanding of functional family claims has seen co-mothers characterised as temporary caregivers, or as capable of providing only a fraction of the maternal role provided by biological mothers. In donor versus mother disputes courts consistently overlooked family function in order to impose biological fathers as parent figures. In this sense I argue that functional parenthood claims have acted to augment, but not to challenge and never to displace, the primacy of genetic links in law's conceptualisation of parenthood.

As a result I argue in that piece that a form of presumed second-parent recognition for lesbian mothers is necessary to preface and ground, but not entirely replace, the functional family model. I note that in the preceding decade much law reform and litigation internationally on behalf of lesbian and gay parents proceeded under a formalistic 'equal treatment' approach, often generated from constitutional arguments in the US, analogising co-mothers with the

position of male parents in heterosexual families. This context produced very little engagement with the underlying principles or discussion of the 'fit' in its application to lesbian-led families. The model I proposed built on ideas first proposed by US family law scholars Nancy Polikoff and Paula Ettelbrick, centring the issues of family formation, parental roles and unmet legal needs, rather than abstract equality claims.²² Here I justify the presumed second parent approach as one that most closely embodies (the majority of) mothers' family formation intentions and argue that family function largely flows on from, and embodies, such intentionality. I also go further to argue that both intention and family function may require additional, adaptive, recognition measures to augment any parenting presumptions in law. This means that there need not be always, or only, two legal parents, depending upon the context of the family formed through assisted reproductive means.

'Unlikely Fissures' builds upon and broadens the questions and conclusions about intentionality that are raised in 'The Limits of Functional Family', examining resonances between the position of lesbian mothers and other contexts in which intention is key to family formation for (mostly) heterosexual families, exploring case studies across three areas of contestation: birth registration, surrogacy and pre-birth disputes over embryos. The birth registration case study²³ highlights the uneasy relationship between equality jurisprudence in Canada in which lesbian families won the ability to register the non-biological mother on the birth register through drawing upon an earlier father's rights claim, and examines the extent to which such equality claims elide significant issues of social context, including caregiving and power imbalances. The third case study²⁴ on surrogacy also explores discomfort with the 'portability' and application of abstract legal claims concerning intentionality in family formation, noting that groundbreaking birth recognition claims made on behalf of lesbian co-mothers in the US state of California drew directly from jurisprudence developed in the context of disputed surrogacy cases – in which 'intention' was about the unchanged intention of the commissioning parents versus the changed intention of the 'surrogate' or gestational mother. Centring intention in surrogacy disputes means prioritising pre-conception intention over post-birth intention, and privileging the commissioning parents' intentions over the reproductive labour of the gestational mother and I suggest that extending such principles without regard to context or to family function is highly problematic.

²² See eg Nancy Polikoff, 'This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families' (1990) 78 *Georgetown Law Journal* 459; Paula Ettelbrick, 'Who is a Parent? The Need to Develop a Lesbian Conscious Family Law' (1993) 10 *New York Law School Journal of Human Rights* 513.

²³ *Rutherford v Ontario (Deputy Registrar General)* (2006) 270 DLR (4th) 90.

²⁴ *Elisa B v Superior Court of El Dorado County*, 37 Cal 4th 108 (2005).

The article continues the argument for an inter-linked understanding of intention and functionality and to models of family recognition that are sensitive and adapted to in-tact as opposed to in-conflict relationships. I go on to re-examine the contested Australian surrogacy case *Re Evelyn*²⁵ to explore how discourses of genetic essentialism played out, in particular in the evolving ‘pro-contact’ family law culture which places great emphasis on the presumed ‘welfare’ benefit of enduring biological relationships. In that case the commissioning parents (of whom the male partner was also a genetic parent) felt that extensive contact with the birth mother and her family (with whom the child had never lived) was threatening to them as a family unit, whereas the court characterised this as simply *maintaining* Evelyn’s family relationships. These concerns about an absent biological parent undermining their sense of family are strongly resonant of lesbian-led families’ disputes with biological fathers. Lesbian mothers have at times opposed contact between sperm donors and children on the basis that the donor’s self-concept as a ‘father’ was undermining their family unit, confusing to the child, and necessitated unequal treatment of siblings based on genetic links when families were formed with different donors. Courts have been overwhelmingly dismissive of such concerns, have ‘naturalised’ the role of donors as fathers and have characterised biological fathers as inevitably *adding* to rather than intruding on or undermining lesbian family units. While in lesbian mother versus sperm donor cases, fathers’ rights discourses and genetic essentialism flow seamlessly into one another to transform the role of biological fathers from gamete donors into bedrock social relationships of unquestioned benefit to children, *Re Evelyn* shows that genetic essentialism does not *always* benefit fathers. Ideas of genetic truth and the importance of genetic relationships to children do not stand alone; rather they are played out in the midst of other pre-existing conceptions of gender roles and family forms, which will sometimes reinforce and other times cut across genetics.

‘Unlikely Fissures’ further explores law’s approach to male genetic links and intentionality in family formation through two UK cases about the use of stored embryos in IVF: the first, *Re R*, involving a woman who used an embryo created with donor sperm without the knowledge of her former partner (raising the issue of his legal status as a parent)²⁶ and the second, the well-known case of *Evans*, involving the desire of a woman to utilise a stored embryo created with her former partner’s sperm to attempt pregnancy against his express wishes.²⁷ The cases highlight the interplay of intention and genetics in legal rules regulating assisted reproduction and parentage such that consent to conception attempts and consent to legal parenthood are intertwined in a quest to avoid ‘fatherlessness’. Through unpacking these cases I argue that it is possible, and in some instances desirable, to frame rules about the use of gametes and the parentage of children that differ, reflecting the fact that adults may have very different

²⁵ *Re Evelyn* (1998) FLC 92-807.

²⁶ *Re R* [2001] 1 FLR 247 ; *Re R* [2003] 2 All ER 131 (CA); *Re R* [2005] 2 AC 621 (HL).

²⁷ *Evans v Amicus Healthcare* [2003] All ER 903; *Evans v Amicus Healthcare* [2004] 3 All ER 1025; *Evans v United Kingdom* [2006] 1 FCR 585 (ECtH.R); *Evans v United Kingdom* [2007] 2 FCR 5 (Grand Chamber).

relationships with gametes, embryos and fetuses than with children. Thus if men in IVF conception endeavours are deceived about and excluded from the conception attempt they could be given the option to opt-in to legal parenthood at a later point; equally if men withdraw their consent *after* the creation of embryos the result could be that they are not a parent in law rather than, as is currently the case, granting them an absolute veto over use of the embryo. Prioritising women's interests in accessing treatment over men's refusal is premised on the far greater physical toll faced by women undergoing IVF and their (usually) more limited reproductive opportunities. This centring of women's experience of risk and investment sidesteps equality analysis to address instead relative interests and impact, and is taken up and further developed in my later work on the regulation of assisted reproduction.

These case studies also highlight another theme that runs through my work; the role of discriminatory laws in restricting or driving choices for participants (who for example deceptively utilise an embryo or seek to use a stored embryo because there is no other family formation option available to them) such that some of the litigated conflicts in this field are in a very real sense generated by the legal rules that seek to resolve them. In later work I respond to this insight by arguing that regulation of assisted reproduction (for example concerning payment for surrogacy in '**Rethinking "Commercial" Surrogacy**', family limits and identity disclosure rules arising in donor conception in '**Numerical Limits**' and '**Identity Disclosure**' and embryo storage and donation in '**Embryo Donation**') must be seen as a work-in-progress, developing in response to the rapidly evolving social science evidence base and the variable and individualised nature of participants' understandings of family and kinship.

'Unlikely Fissures' concludes with a call to reproductive outsiders of all kinds to 'recognise and draw on their commonalities, while being respectful too of differences, in order to work for a legal regime that can fully accommodate both their parental aspirations and functional parent-child relationships'. In later work I continue to develop analysis of the complex site of surrogacy in particular to examine collaborative reproduction and non-genetic parenthood. For heterosexual 'outsiders', family formation with the genetic contribution of a third party through the use of donor sperm, eggs or embryos, or with the gestational labour of another person in the instance of surrogacy involves a loss of autonomy and departure from 'the natural' analogous to the experience of gay and lesbian reproduction.

There may seem to be much more difference than commonality between the position of lesbian and gay families and those of heterosexual people utilising the myriad of forms of assisted reproduction or surrogacy. In particular, the prioritization of genetic connection to both parents by most heterosexual couples, and/or the framing of their claims by reference to

'normal' family, or as close a facsimile as they are able to achieve, act to reinforce both genetic essentialism and heteronormativity, and thus potentially undermine or devalue claims to non-genetic family based on caregiving and functionality. Yet these do not occur in straightforward ways. In **'From Alice to Isabella'** I explore how these tropes of genetic essentialism and naturalness are both engrained and destabilised in recent public and parliamentary debates concerning surrogacy in a wave of law reform across multiple jurisdictions in Australia.

'From Alice' interrogates the role of discourse and narrative in shaping the recent wave of reforms to surrogacy law and policy around Australia. The paper argues that the themes which emerged through the reform dialogues arise from, and contribute to, the reshaping of contemporary understandings of surrogacy specifically and of non-traditional family formation more broadly. Prominent discursive themes in both parliamentary and media accounts included: surrogacy as a 'cure' for infertility; surrogacy as a form of special relationship between family and friends; and, genetics as determinative of the 'real' or 'biological' parents of children. Undergirding these debates is the paradoxical and shifting relation of surrogacy to the 'natural' in terms of reproduction methods, parenting practices and parental desire.

Notably absent from the Australian parliamentary debates was the developing body of empirical research on surrogates and surrogacy families. All of the legislative debates took place following, or in conjunction with, short term public inquiries and notably heard from only a handful of people who had actually gone through surrogacy. At the same time, several dozen Australian individuals and couples who had either engaged in surrogacy to form their family, or planned to do so in the future, participated in print and electronic media stories about surrogacy. I argue that these media representations demonstrably motivated and informed legislative reforms, although not always in a straightforward manner. As such, 'From Alice' is an analysis both of evolving discourses of surrogacy, infertility and ART in Australia, and a case study of a multiple jurisdiction law reform process dominated by narrative, anecdote and 'folk' understandings.

An original finding of this research was the conclusion that an emphasis on maternity and a female-centred focus on the birth-surrogate mother dyad produced an unexpectedly malleable approach to genetic relatedness, encompassing both *more and less* than a dual genetic link to both parents. A number of Australian states considered, and most rejected, provisions restricting surrogacy to gestational arrangements (ie those where the birth mother does not use her own egg) and/or requirements that one or both commissioning parents contribute gametes. In doing so, parliamentarians relied upon idealised and arguably folkloric notions of genetic surrogacy between sisters (in which a direct genetic link with the birth mother provided the child with an indirect genetic link to the commissioning mother). This elastic notion of genetic connection, encompassing non-linear genetic links and broader ideas of 'relatedness'

within discourses of surrogacy acted to undercut dominant discourses of genetic determinism and combined with evolving notions of family diversity to allow less restrictive legislation to eventually pass in the majority of Australian jurisdictions.

The most marked difference found in the two sites of reform dialogue was that while parliamentary debates uncritically perpetuated the stark dichotomisation of 'altruistic' and 'commercial' surrogacy which has been a notable feature of Australian laws and policy to date, in contrast, many of the families who participated in media stories had engaged in commercial surrogacy overseas and spoke positively of the benefits of payment. In my analysis, the press reports revealed a surprisingly nuanced approach to payment, which included some aspects of authorial tone that retained condemnation ('womb for rent') but also explored the role of payment in particular situations and allowed for a wider range of meanings around the roles in commercial surrogacy. This 'unpacking' of payment appears to me to be a new development in Australian public discourses on surrogacy.

I take up the question of payment in surrogacy directly in '**Rethinking "Commercial" Surrogacy**'. Current Australian laws criminalising commercial surrogacy treat the payment of money to surrogates and/or intermediaries as a crude and absolute proxy for all forms of bad practice. Noting the marked absence of social science research in the reform dialogues discussed in 'From Alice' I address the social science evidence base from the US, UK and Israel to contend that payment alone cannot be used to differentiate 'good' surrogacy arrangements from 'bad' ones. I suggest that the recoil of Australian policy makers from any suggestion of commercialisation of reproduction has blinded us to the complexities and resulted in a head-in-the-sand approach to the increasingly transnational practice of commercial surrogacy. I seek to open this debate by contending that Australia can learn from commercial surrogacy practices elsewhere, without replicating them.

I make a case for financial compensation of women who perform surrogacy and the introduction of specialist surrogacy agencies or 'brokers' (encompassing a range of professional intermediaries who co-ordinate and perform screening, matching, counselling and associated support services) and mechanisms such as advertising within Australia. I do so not because I support unregulated fertility markets or am indifferent to the interests of children and vulnerabilities of adult parties engaged in surrogacy. Rather the reverse. The challenge of liberalising access to domestic surrogacy is informed by an awareness of the increased practice of cross border surrogacy and concern over the vast schism that has opened between, on the one hand, increasingly stringent clinical and ethical standards in operation in domestic regulated treatment, and on the other, highly variable clinical and ethical practices which take place abroad. For example the transfer of multiple embryos is common in international surrogacy arrangements because it increases the likelihood of a pregnancy, and in doing so it

hastens the process and boosts 'success' rates of clinics and agencies, while producing dangerously high multiple birth rates with adverse health effects such as premature and underweight births.²⁸ While not all cross border treatment should be characterised as sub-standard, its use does give rise to an increased risk of exposing offspring to inheritable and birth disorders and reduces or negates access to beneficial ethical practices such as the possibility of future information sharing and identity disclosure. My later work develops a deeper understanding how legal regulation could respond to avoidance and evasion by becoming more facilitative in order to induce participation in formal regimes.

The principal ethical precondition for surrogacy in my view is informed and continuing consent of the surrogate. Textured or authentic choice requires a background of life conditions which do not constrain her options to the point that surrogacy is pursued for money when it would otherwise be an unacceptable practice to her. In the context of surrogacy laws, informed and continuing consent requires that the surrogate has full control of pregnancy care and relinquishment of the baby post-birth, with consensual transfer of parentage *after* birth. I contend in this article that these elements are not incompatible with compensated surrogacy or the involvement of intermediaries. Indeed, high quality and truly independent professional intermediaries have an important role to play in ensuring that choices are freely made and fully understood.

My later work explores more deeply and in greater detail the distinct tension between, on the one hand, a growing visibility of a wide variety of non-genetic family forms, and on the other, increasing emphasis on genetic identity in public discourse and in social and legal policy. The rise of 'genetic essentialism' - the idea that genes are constitutive of self and family either to the exclusion of or as a trump over social relationships - has occurred through a process by which increasingly perfectible access to genetic information has translated into the *right* and *need* for us all to know the 'truth' of our genetic origins. In turn access to this genetic 'truth' (or history or roots) is laden with cultural values of identity-formation and self-understanding such that this genetic knowledge is understood to be essential for 'completeness' as an individual.

²⁸ Furthermore, regulated ethical approaches to reproductive donation in the domestic context require careful and continually refined approaches to consent and counselling processes in licensed ART treatment and, as part of that process, require every donor's advance commitment to identity disclosure in the future should offspring wish to access this information. In contrast, the time and cost pressures of transnational arrangements mean that both donors and parents are fast-tracked through processes that may not appropriately address the psycho-social dimensions of treatment or potential offspring needs. Australian parents who have subsequently sought to identify or make contact with egg donors and surrogates from the country of treatment have often found this difficult or impossible to achieve.

In family and reproductive policy, a right to knowledge has gradually been transformed from the mere identification of progenitors to an increasingly unquestioned assumption that identification of genetically related individuals inexorably results in contact with them, leading to an ongoing social relationship between once lost and now reunited 'relatives'. By way of example, when the Australian state of New South Wales (NSW) passed the *Assisted Reproductive Technology Act* in 2007, introducing a compulsory centralised donor register for the first time, it also reduced the number of families who could be born to each donor and introduced for the first time a right for donors to direct their donation *away* from, certain 'classes of women'. This provision was justified by the government on the basis that when the child and their 'genetic parent' meet, it is,

in the best interests of the child for the genetic parent to have given consent to the circumstances surrounding the child's birth and upbringing.

To put this in another way, it will not be in the child's best interests to discover later in life that their genetic parent has a fundamental objection to their existence or the social and cultural circumstances in which they were raised.

Thus in this scenario gamete donors (who become here 'genetic parents') must be able to relate not just to the child but be able to connect with and approve of the child's 'social and cultural circumstances' (elsewhere known as, but not here named as, their 'family').

Moreover, the expectation of family reunification with donors implies that the absence of such connection will be experienced by off-spring as a *loss* or *lack*. In this trope, intact functioning genetically unrelated families of mutual care and support are, and always will be, *incomplete*. Importantly, Alison Diduck identifies how genetic relationships are collapsed into the discourse of child welfare such that biological relationships are granted 'priority, *in the name of welfare*, over social ones' (Diduck 2007 emphasis in original). Thus, children's welfare or best interests are not regarded as *separate* or additional considerations to those of genetic relatedness; rather they are inseverable and mutually reinforcing, as the above example illustrates. In the last three of the articles presented here I contest these ideas in the context of empirical work on donor embryo recipients and sperm donation recipients drawn from a larger study concerning IVF decision making. My aim in these papers is to unpick the threads of knowledge, kinship and genetic links through exploring participants' diverse and evolving understandings of their relationships. In doing so I argue for ways that law can provide avenues to respect and acknowledge these understandings, without imposing or assuming particular family relationships as a consequence of genetic links.

Research into embryo donation has been dominated by the question of donation for research purposes (particularly stem cell use), with comparatively little attention to the issue of

reproductive use. **‘Embryo Donation for Reproductive Use in Australia’** reports on original empirical research with colleagues Isabel Karpin and Anita Stuhmcke into decision-making concerning stored embryos utilising both surveys and interviews of IVF participants. This is the only co-authored paper presented here, and I claim 40% of the contribution to that piece. The following two papers are sole authored but draw upon the same empirical research project and owe a deep intellectual debt to our collaboration and shared thinking, talking and arguing about the issues over the four years of the project.

The research from **‘Embryo Donation for Reproductive Use’** made a major contribution to understandings of stored human embryos – not as entities of singular moral significance in themselves but rather as relational entities of unique meaning and value to the woman who underwent treatment to create them (and her partner). This insight offers the ability to sidestep dichotomised views of embryos either as precious ‘life’ or mere ‘cells’ and allows us to develop legal regimes which respond more sensitively and flexibly to the range of individual meanings and experiences of IVF patients across a myriad of legal and ethical rules that govern the use, donation and disposition of stored embryos.

The ‘Embryo Donation’ article specifically addresses notions of relatedness as they arise in the context of donation for the reproductive use of others. The reluctance of IVF participants to donate has been reported elsewhere, and those findings were largely confirmed by the majority of non-donors in our own study. We reflect on the rationales against donation and challenge the orthodox position taken in some of the literature that embryo donation is akin to adoption, instead unpacking the threads of attachment and relatedness to find that they encompassed varied notions of possessiveness, responsibility, unknowability and guilt. The major significance and originality of the piece is in its reporting on interviews with ten people who had actually donated embryos for the reproductive use of others and four people who were recipients of donated embryos. In addition, another nine interviewees had attempted to donate, or had a strong desire to donate, but had been prevented from doing so. Although the number of interviewees under discussion is small, and we acknowledge that caution must be exercised over drawing general conclusions, this pool of participants, including as it does both donors and recipients, is among the largest cohort of interviews in any of the extremely scarce Australian research to date on the experience of embryo donation for reproductive use, and has the added strength of addressing donation practices across numerous clinical sites under legal frameworks in different states.

The article examines why the donors interviewed were willing and able to donate, and presents findings concerning the donation process and models in operation, including matching and counselling practices and the contentious question of ‘directed donation’. The article also

examines the experiences of the ‘would-be’ or thwarted donors and queries the rationales for some of the external barriers to donation in law, ethical guidance and clinical practice identified in the course of the study. As with my other non-empirical works presented here, the analysis reaches beyond ‘law on the books’ to ask instead how law appears in the lived experience of those most affected by it.

We found among both donors and non-donors a strong sense of the lateral relationship between future genetic siblings as one of significance, arguably prioritised by many as more significant than the lineal descendant link with either or both parents. This original finding was taken up in ‘Identity Disclosure’ through exploration of both the sociological literature and data derived from formal donor identity registers. I suggest that while registers are premised on offspring seeking the identity of donors, the interest of donor families may lie much more in seeking out other offspring, and that registers are largely ill equipped to address this interest, most particularly when initiated by parents. These last three papers all focus upon the views expressed by parents and prospective parents in the research study, and the latter two on the experiences and views of the parents of donor conceived children. In part as a result of peer reviewer criticism of these papers as ‘parent-centric’ I engage with child’s rights and best interests discourse and the way that they have appeared in ART policy and debates as ‘competing’ with the interests of parents and donors. I see rights talk as both hollow and facile in this context and as such seek to avoid the framework of ‘competing rights’ and oppositional placement of (potential) parents and (potential) children’s interests in assisted reproduction policy development. This research work most clearly articulated my relational premise: that the interests of parents and children are intertwined and that ART policy should be understood as part of this relational matrix. Parents are the people most directly invested, and specifically concerned with gauging and acting upon, both existing and potential future children’s anticipated needs in the lived context of their family life. This is not to suggest that offspring views and interests are unimportant; rather, that children’s rights or best interests are neither singular nor self-evident and indeed have been interpreted and applied by adults and regulators in highly divergent and contradictory ways in recent decades.

The ‘**Numerical Limits**’ article critically examines the setting of limits on the number of children or family groups that may be formed with a single donor in assisted conception regimes. Originally, under conditions of anonymity, numerical limits were said to contain the risk of inadvertent consanguinity between offspring who would not know, and could not know, that they were genetic half siblings, and also between donor and offspring. The increasing embrace of identity disclosure regimes has led to calls for stricter numerical limits based on the assumption of connection to ‘too many’ genetic relatives in the future. This article challenges the developing orthodoxy that donor conceived individuals must be protected by law from having ‘too many’ genetic links and asks: how many is too many? And how do we know? The

UK and Australian positions are examined, and placed alongside a discussion of qualitative research involving interviews with 20 parents of donor conceived children. The paper examines overarching policy rationales for numerical limits before reflecting on how the experiences of interviewees in the study refract, contradict and complicate such rationales in the hope of informing further reforms with a more nuanced account of relatedness.

The article is original in seeking to openly address the relationship between numerical limits and identity disclosure regimes, exposing the underlying 'common sense' assumptions and lack of evidence base informing policy development in the field. I explore the limited information available on what family numbers, and sibling numbers, have actually resulted under previous limits, as well as the likelihood of contact being sought and made in the future in the context of open disclosure. Social and cultural perspectives on genetic links, as well as actual experience of such relationships, must be carefully unpacked in order to determine what number is likely to be 'burdensome'. I found that there were several factors which contributed to participants' sense of 'many' or 'few' genetic relatives. In particular, whether parents were mostly concerned about avoiding inadvertent contact or with making deliberate contact with the donor or half siblings influenced their sense of what the number meant. In tandem with these concerns was a varied experience of nearness (commonly expressed as 'it's a small town') involving consideration of geographic spread as well as cultural dimensions of proximity such as the concentration of particular community groups. This empirical finding has fed into my developing analysis of the multiple and contingent meanings of relatedness and how these can be mapped into legal regimes that govern family relationships, including but not limited to, identity disclosure regimes.

An important finding of the research was that the women interviewed valued genetic links between their children and were strongly motivated to use the same donor for later pregnancies. Although women in lesbian relationships and single mothers had elected to create a family unit in which their child is not raised by two genetic parents, this did not mean that they did not value genetic links, in particular between siblings. Indeed the reverse was arguably the case as a number of women expressed the significance of a 'full' or '100%' genetic link between siblings as *more* important because it simplified already 'complex' relationship constellations. This link was not necessarily seen as inherent but rather a function of the value placed by others on genetics. The *socially valued* aspects of such links appeared significant. As parents contemplated their children seeking out a donor later in life, several stated that it was a major factor in their preference for the same donor, because they wanted their children to be able to share in that experience, to support each other, and to be similarly situated. In particular, a number of women volunteered that they would be worried if one child could find their donor and the other child was not able to do so.

Yet changes in the legislative definitions used in setting the limit in two Australian jurisdictions (from 'families' to 'women') impacted adversely upon lesbian-led families as they were characterised as exceeding the limit if the second 'woman' in the couple sought to utilise stored sperm or embryos previously used by the other woman. For these families the only option left to have another child with the second woman was to move on to use an additional donor unrelated to their first child. Thus a smaller number of 'women' per donor perversely translates into a larger number of donors per family. Law's role in this scenario is arguably to undervalue genetic connectedness within the family unit because of its singular focus on policing the number of genetic links taking place outside of it. This case study suggests that legal regulation has been both paternalistic and intrusive and highlights the importance of law attending to individualised experiences of relatedness rather than to universalised understandings.

While I contest the vein of genetic determinism which blurs information and family relationships in some of the policy and scholarly debate, my view is that 'open disclosure' (ie of the fact of donor conception and access to the donor's identity) is a vital pre-requisite to enable donor conceived people to make their own choices about accessing information and to form their own meanings and connections regarding genetic links. '**Identity Disclosure**' explores the scope and effectiveness of formal donor identity registers currently in operation in assisted conception regimes in Australia and the UK. As with my earlier research in these last three articles I undertake comparative legal analysis and engage with the findings of sociological findings, but in addition this is augmented with original empirical research, to reflect on the experiences of those affected by existing legal regimes and to develop responsive reform proposals.

The article examines the function of voluntary registers which are intended to fill the gaps left by 'central' identity registers that mandate timed release of donor identity on request of donor conceived adults. Like 'Numerical Limits' this article reflects on interviews with a set of parents who had undertaken donor conception in Australia through licensed IVF treatment specifically addressing their understandings of disclosure regimes and wishes for, and experience of, seeking information and contact.

Although in the UK there was centralised record keeping by the Human Fertilisation and Embryology Authority ('HFEA') concerning assisted reproduction from 1991, the information kept on donors was quite limited, and only expanded and made consistent through new regulations in 2004. Identity disclosure donors were required from 2005, with mandatory and voluntary registers established at the same time. In contrast to the UK, Australia offers a patchwork of varied regimes across states and eras. Three Australian states have government held or 'central' registers, while individual clinics in the remainder still hold donor identity

records and facilitate the process of information exchange and identification (as do clinics in legislated states, concerning records preceding the introduction of registers) in a process that is regulated through national ethics guidance. There is divergence in law and practice throughout Australia regarding issues such as the age at which identifying information may be sought; the era of treatment covered; access to donor identity while offspring are still minors; access to information identifying half-siblings and access to non-identifying information.

This research found that the current formal voluntary registers in the UK and Australia have been dramatically underutilised, with low rates of registration and few matches made. While the development of identity registers in Australia and the UK have been at the forefront of developments in this field, I argue that they have been premised upon the linear descendant genetic link as vital information to be prospectively released to young adults upon the attainment of majority. These registers leave a number of gaps: most notably requests for access to information from the era of anonymity; access to information prior to the age of majority and access to information on other offspring (at majority) or recipient families (for parents of minors). The significance of these lateral links has been largely overlooked by legal regimes, despite burgeoning sociological research on these links, a development that was reflected in the present study. Likewise the role that parents play in shaping, seeking and facilitating such lateral relationships either in making contact as family groups, or in seeking information on behalf of their children, is overlooked by disclosure regimes premised upon the donor-offspring dyad. I suggest that the high rate of participation of parents where they are permitted access to voluntary registers indicates such registers would be more effective if they were broadened in scope.

The article concludes that identity disclosure rules in current assisted conception regimes appear to operate in ways that paradoxically act to both create and deny opportunities for the development of broader non-traditional kinship networks. Regulators increasingly mandate collection and timed release of records of donor identity, compel provision of counselling to gamete recipients about the importance of openness with children about the fact of donor conception, and even impose disclosure (for example through specifically marked birth records in the Australian state of Victoria). Yet at the same time that normative messages are communicated by the State and by fertility practitioners about the (potential) importance of genetic information in the formation of future children's self-identity, these same agencies in some instances refuse to facilitate communication between parties who have internalised such messages and, wishing to act upon them through early disclosure and discussion with their children, request varied forms of direct and indirect contact or other forms of non-identifying information about donors and offspring. Flat statutory disclosure regimes provide for particular kinds of information at set times to prescribed individuals, with little or no ability to adapt to

more diverse requests. They also, arguably, fail to acknowledge the important role that parents play as custodians of information and of their children's current and future interests.

Formal voluntary registers offer the hope of contact and information sharing, but very little prospect of its realisation and, as such, could be seen to contribute to an institutionalised 'limbo' that some donor conceived people, and donors, experience from assisted conception regimes. The article applies these insights to argue for reforms, in particular the development of an 'active' voluntary register capable of operating both prospectively and retrospectively, making contact with possible participants and offering intermediary services to establish and communicate expectations and to offer mediated contact, including contact without identity disclosure. I contend that this is a better solution than the current polarisation between an inability to access information for many on the one hand, or proposed alternatives such as retrospective identity disclosure without donors' consent, on the other.

Conclusion

The significance and originality of my work lies in its focus upon **law's response to non-genetic families**. I have always centred the experience of family formation and family life such that I have traversed and linked distinct legal sites and doctrines, examining access to family formation avenues, models for legal recognition of families once formed and, latterly, legal responses to information sharing and broader kinship practices among genetically related individuals in childhood and later life.

In doing so I have made a major contribution to a body of scholarship centring '**lived lives**' in the exploration of family, relationship and reproduction law at its broadest, incorporating comparative analysis across closely related jurisdictions, attention to and integration of sociological data, and a focus on responsive practical reform outcomes.

As an important part of my focus upon lived lives I have brought a continual awareness of gender to the unpacking of 'gay and lesbian' equality claims and reform movements to analyse the differential position of women and men in relation to parenting and paid labour, and latterly to build a framework of analysis that bridges heterosexual/same-sex family formation issues (papers 1, 2, 3) to examine links and resonances across '**reproductive outsiders**' or non-genetic family forms (papers 3, 4). The sweep and reach of this approach makes an original contribution by **stepping out of doctrinal and jurisdictional silos** to examine the impact of law upon, and the unmet legal needs of, non-genetic families through the life cycle.

Throughout these works I have contributed to analysis and debate about the role of 'the eternal biological family' in law, specifically engaging in the inter-relation of developing social

notions of genetic essentialism, father's rights and recognition of non-genetic family forms, in legal regimes governing family relationships. I have been one of the leading thinkers in the area of '**functional family**' developing a clear articulation of how these ideas, drawn from psychology and sociology were mapped across into legal regimes recognising informal relationships (paper 1), examining the limitations of 'functionality' when in conflict with genetic parenthood (paper 2) and going on to build a framework for understandings of legal parenthood in non-genetic families as involving a dynamic interaction of intentionality and functionality (paper 2 and 3).

In my work on ART and surrogacy I have built upon a body of feminist work on **relational theory**, agency and **resonant choice**. I have applied this approach to argue for the centring of an understanding of the interests and needs of parties in ART as part of a web of relationships rather than as isolated and oppositional rights (papers 6, 7, 8). In particular I have made original contributions to understandings of the human embryo in law not as an entity worthy of recognition in its own right, but as an object of unique value to the woman who created it, including on occasion as an imagined relation (paper 6); in directing attention to lateral rather than simply linear genetic links in ART law and policy (paper 6, 7, 8); in looking at how the views of parents shape and interact with those of offspring in seeking information on genetic relatives (paper 8) and in understandings of the significance of the numbers of potential genetic relatives (paper 7). In this area I have made important contributions to unpacking policy rationales and examining the largely ignored evidence base concerning family numbers and identity disclosure regimes (papers 7, 8) and concerning the experiences of surrogates in the development of laws governing surrogacy parentage and payment (papers 4, 5).

I have argued for a **nuanced and attentive notion of relatedness in law**, incorporating the diverse and changeable understandings of the significance of genetic links (traversing a wide range of meanings from information source to family member) that individuals in non-genetic families formed through ART have expressed (papers 4, 5, 6, 7, 8).

Taken together, this is a body of feminist socio-legal work on the regulation of family relationships, assisted reproduction, genetics, kinship in law. Through this work I have made an original contribution to both scholarly thinking and legislative and policy frameworks responding to the needs of non-genetic family forms.